INDIAN LAND CLAIMS IN BRITISH COLUMBIA

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Secretariat for Indian
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Historical Background

Unlike most provinces, British Columbia is largely without Indian treaties. As a result, Indians claim the continued existence of "native title" and/or "aboriginal rights," based on historic Indian use and occupancy of the land and the fact that Indians were never defeated in battle by Europeans.

For most Canadian Indians, aboriginal rights were derived from the Royal Proclamation of 1763. The Proclamation was a formal statement of British Indian policy designed to ensure the maintenance of law and order in British North America. One of its major provisions was the reservation of Indian hunting grounds for the use of Indians. It outlined a procedure whereby the Indians would be able to cede their lands formally, through the British Crown.

The land mass of British Columbia was undiscovered at the time of the Royal Proclamation, and therefore it is not seen as a source of aboriginal rights in B.C. In fact, the rights issue did not arise in British Columbia until after the 1850s, during which time James Douglas, Governor of the Colony of Vancouver Island and Chief Factor of the Hudson's Bay Company, made treaties with Indians on southern Vancouver Island.

These were minor treaties (14 in all) covering indeterminate areas and principally guaranteeing Indians the right to carry on hunting, fishing and trapping. The only major treaty in British Columbia was made in 1899, when the federal government reached agreement with some of the bands in that part of B.C. which is east of the Rockies. Known as Treaty 8, it also covered parts of northern Alberta and Saskatchewan and extended into what is now the Northwest Territories.

At the time of British Columbia's union with Canada in 1871, no mention was made in the Terms of Union of treaties or aboriginal rights. Article 13 of the Terms of Union specifically put the charge of the Indians and the trusteeship and management of lands reserved for their use and benefit in the hands of Canada, and obligated the Province to convey tracts of land in trust for the use and benefit of the Indians. As well, Article 1 of the Terms committed Canada to be responsible for any of the debts of the former colony that were in existence at the time of Confederation.

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The omission of mention of native title could hardly have been an oversight, for Canada was at that time involved in receiving into the Dominion, subject to the recognition of Indian title, the Northwest Territories and Ruperts Land. These lands became part of Canada further to an Imperial Order in Council of 1870 which required that:

> "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government."

As well, in 1871 the Federal Government signed Treaty 1, which extinguished the Indian title to the new Province of Manitoba.

In the 1870s aboriginal rights became an issue as Indians recognized that their traditional uses of the land were being curtailed by settlement and laws. The Provincial Government refused demands to set aside large areas as Indian reserves and enunciated the policy that aboriginal rights--if they had ever existed in British Columbia--had long since been extinguished by colonial ordinances respecting the use and disposition of land. Successive governments have held to this position.

Federal policy, too, denied the existence of an unextinguished native title in British Columbia, although at various times the Federal Government toyed with the idea of going to court for a decision on whether aboriginal rights existed in this Province. No action was ever taken. In 1963 and 1965 the Federal Government proposed the creation of a "Land Claims Commission," but again no action was taken.

Even though the two governments had agreed since Confederation that Canada was the jurisdiction responsible for Indians and Indian lands (because of Article 13 and Section 91(24) of the B.N.A. Act) there was disagreement over the adequacy of the provision of reserve lands by the Province to Canada for the Indians. The Province had undertaken an obligation to convey tracts of land to Canada in trust for the use and benefit of the Indians, but the fact that settlers were permitted to pre-empt up to 160 acres west of the Cascades and 320 acres east of the Cascades, while Indians could not, contributed to Indian unrest.

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In 1920 Dr. J. A. J. McKenna, the federal expert on Indian matters, wrote an article stating: "When British Columbia satisfactorily meets the land requirements of the Indians, she cannot, altogether apart from the Terms of Union, fairly in the face of arrangements with Ontario as to the North West Angle Treaty, be asked to do more."

In 1927 a special joint committee of the House of Commons and the Senate considered a petition from a British Columbia Indian organization known as the Allied Tribes, holding hearings in Ottawa. In its report the Committee considered the Indian reserves which were allocated to be adequate for Indian needs and denied the Indian claim to aboriginal title. An annual annuity of $100,000 was recommended for British Columbia Indians in lieu of treaty payments.

Subsequently, Parliament passed a law prohibiting the raising of funds for the purpose of pressing Indian land claims. That law, made in 1927, effectively squelched the aboriginal rights claim for many years. In 1951, a new federal Indian Act omitted the restriction on land claims activity.

In contemporary history the aboriginal rights issue was brought into focus by the Nishga, who took the Province to court in the late 1960s over the issue of aboriginal title. "Calder vs. the Attorney General of B.C.," in which the Indians sought a declaration that native title existed in the Naas Valley was heard in the B. C. Supreme Court and and Court of Appeal in 1969. The lower Courts confirmed provincial policy: if native title had ever existed in the territory in question, it had been extinguished by laws passed by the Colony of British Columbia prior to Confederation. The decision eventually reached the Supreme Court of Canada, which upheld the decision of the B. C. Court of Appeal but divided evenly on the issue of native title and thus brought about an immediate change in federal policy.

In 1969, a federal white paper on Indian affairs had proposed a dramatic re-ordering of the relations between the Indians and the greater society. It suggested, among other things, that the Indian Act be repealed; that the reserve lands be turned over to the Indians; and that the Department of Indian Affairs be phased out. Prime Minister Trudeau, in a speech in Vancouver, dealt with the land claims issue by declaring that "on the question of aboriginal rights--our answer is no." The 1969 policy had styled such claims as being so general in nature as to preclude their resolution by negotiation.

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In 1973 the Federal Government did a complete about-face as a result of the Supreme Court's decision in the Nishga case. It announced that Indian claims should be resolved; that negotiation, rather than litigation, was the preferred means to resolve such claims; and that where provinces were affected, they should participate in negotiation and settlement. A series of communications then took place between the Federal Government and the Government of British Columbia respecting provincial involvement in the negotiation of the Nishga and other claims.

In 1976 the Provincial Government met with the Federal Government and the Nishga Tribal Council to discuss elements of the Nishga claim, and late that year the Nishga formally submitted a written land claims demand to the two governments. This was considered by the government in 1977, and a written response was made to the Nishga. The response made it clear that the Provincial Government was willing to discuss Indian grievances and take action to resolve them to the extent that they fell within areas of provincial jurisdiction. However, it stated: "The Provincial Government does not recognize the existence of an unextinguished aboriginal title to lands in the province, nor does it recognize claims relating to aboriginal title which give rise to other interest in lands based on traditional use and occupancy of land. The position of the Province is that if any aboriginal title or interest may once have existed, that title or interest was extinguished prior to the union of British Columbia with Canada in 1871."

The Nishga discussions have continued sporadically since 1977.

As of December 1985, the federal government has accepted 15 British Columbia claims for negotiation, yet the federal government has never acknowledged, either verbally, in writing or by executive action, that there is an unextinguished Indian title in British Columbia.

The Haida Claim

The Haida comprehensive claim was filed with the Office of Native Claims of the Department of Indian and Northern Affairs in 1980. The federal government accepted it for negotiation in 1983. Neither the federal government nor the Haida have made a copy of the claim available to the Government of British Columbia. It is understood that an analysis of the claim was undertaken by the departments of Justice and Indian Affairs, but such analysis, if it exists, has not been made available to British Columbia.

Federal vs. Provincial Responsibility

Constitutionally, only Canada can negotiate treaties and make settlements. Only Parliament can extinguish Indian title.

The federal position that there may be an unextinguished Indian title in British Columbia is a policy determination, not a legal one.

Treaty 8, which takes in northeastern British Columbia, was made in Canada in 1899. British Columbia did not participate in negotiations and was not a party to the treaty.

Section 35 of the Constitution Act, 1982, recognizes and affirms "existing aboriginal rights." The Constitution is silent with respect to aboriginal title.

Section 91 (24) of the Constitution Act, 1867, charges Canada with responsibility for "Indians, and lands reserved for the Indians."

This is reiterated by Article 13 of British Columbia's Terms of Union with Canada of 1871. Article 13 states, "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union."

The Article further says that "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government . . ."

By Article 1 of the Terms of Union, Canada assumed any outstanding liabilities of the Colony at the time of Confederation.

Given the foregoing, the Government of British Columbia believes that Canada is fully within its right in making treaties and/or land claims settlements, and that Canada must bear the burden of the cost of such settlements.

If Canada seeks the assistance of British Columbia through the contribution of lands and resources, it is the responsibility of Canada to propse to British Columbia how the Province and third parties would be compensated for any lands and resources that might be made available.

Interests in Land

Table 1 illustrates the nature and size of commitments against land in British Columbia.

Claims Accepted for Negotiation

Table 2 lists the 15 comprehensive land claims in British Columbia that have been accepted for negotiation by the federal government as of December, 1985.

TABLE 1

SUMMARY OF COMMITMENTS AGAINST THE PROVINCIAL LAND BASE

1.	Total land area of British Columbia	92,900,000 ha.
	Total provincial Crown land	86,500,000 ha.
	Total useable provincial Crown land (excludes uncategorized, primarily barren land)	53,500,000 ha.
	Total commitments against land base (see below)	123,000,000 ha.
	Total commitments against provincial Crown land	116,600,000 ha.
2.	Commitments Against Land:	
	Forestry (provincial forests, tree farm licences)	81,800,000 ha.
	Grazing	8,700,000 ha.
	Agricultural Land Reserve	4,700,000 ha.
	Water Supply (district watershed)	1,000,000 ha.
	Sub-total	96,300,000 ha.
	Wildlife (greenbelt, conservation areas)	900,000 ha.
	Recreational (national, provincial and regional parks)	5,000,000 ha.
	Ecological Reserves	100,000 ha.
	Sub-total	6,100,000 ha.
	Mining (mineral claims, mineral and quarry leases)	2,700,000 ha.
	Energy (petroleum leases)	11,700,000 ha.
	Rights-of-Way (transmission lines, pipelines)	50,000 ha.
	Sub-total	14,400,000 ha.
	Miscellaneous commitments	300,000 ha.
	Federal Crown Lands (not including national parks)	100,000 ha.
	Indian Reserves	300,000 ha.
	Sub-total	400,000 ha.
	Private lands	5,500,000 ha.
	Total commitments against land base	123,000,000 ha.
3.	Vacant Crown Land	1,600,000 ha.

Note that, due to overlapping commitments, the total committed area exceeds the provincial land base.

TABLE 2

BRITISH COLUMBIA COMPREHENSIVE CLAIMS

1. Accepted Claims:

The following claims have been accepted for negotiation by the federal government in conformity with the federal comprehensive claims policy:

1. Nisga'a Tribal Council Claim (1974)
2. Kitwancool Band Claim (1977)
3. Gitksan-Wet'suwet'en Tribal Council Claim (1977)
4. Kitamaat Village Council (Haisla Nation) Claim (1978)
5. Association of United Tahltans Claim (1980)
6. Nuu-Chah-Nulth Tribal Council Claim (1983)
7. Council of Haida Nation Claim (1983)
8. Heiltsuk Nation Claim (1983)
9. Nuxalk Nation (Bella Coola) Claim (1983)
10. Nazko-Kluskus Band Claim (1983)
11. Kaska Dena Council Claim (1983)
12. Carrier-Sekani Tribal Council (1983)
13. Alkali Lake Band Claim (1983)
14. Taku Tlingit (Atlin Band) Claim (1984)
15. Kootenay Indian Area Council (submitted October 1981)

Rejected Claims:

1. Musqueam Band Claim (December 1977)

2. Claims Under Review:

Claims currently under review by the Office of Native Claims and the Department of Justice include:

1. Allied Tsimshian Tribes (submitted May 1982)
2. Council of the Tsimshian Nation (submitted September 1983)
3. Kwakiutul First Nations (submitted June 1984)
4. Nlaka'pamux Nation (submitted July 1984)
5. Sechelt Band (submitted October 1984)

3. Anticipated Claims:

1. Lillooet Tribal Council
2. Salish of Georgia Strait
3. Sto:lo Nation
4. Shuswap Nation Tribal Council
5. Okanagan Tribal Council
6. South Vancouver Island Tribes
7. Chilcotin Tribal Group